IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 324 OF 1999

1. M/s. Colfax Laboratories
   (India) Ltd., a Company
   incorporated under the
   Companies Act, 1956,
   having its Registered Office,
   at Rua de Ourem, Panaji,
   Goa.

2. Mr. Eric Menezes,
   the Managing Director and
   share-holder of Petitioner
   No.1 abovenamed residing
   at Altinho, Mapusa, Goa. … Petitioners

versus

1. The State of Goa through
   the Finance Secretary,
   Secretariat, Panaji, Goa.

2. The Commissioner of State
   Excise, Government of Goa,
   Panaji, Goa.

3. The Excise Inspector
   Incharge of M/s. Colfax
   Laboratories(India) Ltd.
   Ponda, Goa. … Respondents

Mr. Fredur de Vitre, Senior Advocate with Mr. M. S. Sonak, Mr. Riyaz Chagla, Mr. Nusrat Hussain, Mr. S. M. Singbal and Mr. S. Srivastva, Advocates for the Petitioners.

Mr. M. S. Usgaonkar, Senior Advocate with Mr. S. Sardessai, Advocate for the Respondents.

CORAM : B. H. MARLAPALLE &
N. A. BRITTO, J.

DATE OF RESERVING
THE JUDGMENT: 5/6-10-2004.

DATE OF PRONOUNCING
THE JUDGMENT: 3-11-2004.

JUDGMENT(PER B.H.MARLAPALLE,J.)

The Petitioner No.1 is a company incorporated under the Companies Act, 1956, having its registered Office at Rua de Ourem, Panaji, Goa and the Petitioner No.2 is the Managing Director of the said company. The Petitioners had applied for licence to manufacture cosmetics, namely shaving cream, body talcum, hair cream and after shave lotion under the trademark "Old Spice" on 14th February,1968 under the Drugs and Cosmetics Act, 1940 and they were granted a licence on 15th April,1968. They were also granted licence under the Medicinal and Toilet Preparations(Excise Duties) Act, 1955 (hereinafter referred to as the said Act, for short) by the Commissioner of Excise on 1st April, 1969. From the inception till the year 1984, the Petitioners paid excise duty on "Old Spice" after shave lotion on the basis that it was "toilet preparation". However, purportedly based on the Judgment of the Supreme Court in the case of **Chimanlal Jagjivandas Sheth** v. **State of Maharashtra(**AIR 1963 SC 665) the company had applied for re-classification of the product as "medicinal preparation", on 14th January, 1985, to the

Commissioner of Excise, Government of Goa, and this application was allowed by holding that the product “after shave lotion” was required to be classified as “medicinal preparation” and not as “toilet preparation” under the Act. This Order was made effective from the date of issuance and consequently vide Order dated 12th June, 1985, the Excise Commissioner classified the production “after shave lotion” as falling within the ambit of Item No.1(i)(b) of the Schedule to the Act. The Petitioners then applied for refund of excise duty paid after the Order dated 23rd March, 1985 and the Excise Commissioner ordered refund of excise duty by his Orders dated 26th August, 1985 and 27th November, 1985.

2. On 14th January, 1989, M/s. PJM Pharmaceuticals Pvt. Ltd. filed an application before the Drugs Controller, Govrnment of Goa, for manufacture of the following cosmetic products under Loan Licence with the Petitioner-Company:-

1. 'Blue Stratos' after shave lotion 50/100 ml. Splash and 50/100 ml.spray;

2. 'Blue Stratos' after shave lotion 100 ml. Travel Pack;

3. 'Blue Stratos' cologne 50 ml. spray; and

4. 'Blue Stratos' lather shaving cream 30/70 gms.

The said application was approved by the Drugs Controller by issuing licence on 13th February,1989 and by further Order dated 12th October, 1989, the Excise Commissioner approved the price inclusive of duty as well as the maximum price for the products and consequently the said M/s. PJM Pharmaceuticals Pvt. Ltd. started paying duty on the after shave lotions at the rates applicable to the "medicinal preparations". Thus, from the year 1985 till 1991, the despatchers were cleared under the classification of "medicinal preparations". However, by Demand Notice dated 13th March, 1991, issued under Rule 12 of the Medicinal and Toilet Preparations(Excise Duties) Rules, 1956(hereinafter referred to as the said Rules), the Petitioners were called upon to pay the short fall in duty amounting to Rs.92,43,684.08 in respect of "Blue Stratos" after shave lotion manufactured for M/s PJM Pharmaceuticals Pvt. Ltd. and by another Demand Notice dated 15th May, 1991, issued under Rule 12 of the said Rules the Petitioners were called upon to show cause as to why duty amounting to Rs.17,77,18,361.20 should not be recovered from them in respect of "Old Spice" range of after shave lotions cleared from 1985 onwards.

3. The Demand Notice dated 13th March, 1991, was challenged by the Petitioners by filing Writ Petition No. 109 of 1991 which was disposed of by this Court on 22nd August, 1991. The Excise Commissioner was directed to treat the said Demand Notice dated 13th March, 1991 as Show Cause Notice and he was authorised to

supplement the said Notice by any additional grounds/materials, if so desired. The Petitioners also challenged the Demand Notice dated 15th May, 1991, which was also disposed of in the same terms as in Writ Petition No.109 of 1991, on 23rd September, 1991. Accordingly, Supplemental Memorandum dated 6th September, 1991 and 30th September, 1991 were issued by the Commissioner under which the after shave lotions were proposed to be classified as "toilet preparations". The Petitioners filed their reply and were heard. By Order dated 7th November, 1991, the Commissioner of Excise held that the demands were substantially barred by limitation and that the correct classification of after shave lotions were required to be determined by the Standing Committee under the said Rules. This Order was challenged by the Respondents by filing appeals under Rule 127 of the Rules before the Chief Secretary, Government of Goa, whereas the Petitioners challenged the said Order as well as the filing of the appeals by the Respondents in Writ Petition No.84 of 1992 which was disposed of by a Division Bench of this Court on 21st/22nd December, 1994. This Court held that the Excise Commissioner and not the Standing Committee was empowered to classify and levy the duty prescribed under the Act. The Excise Commissioner was, therefore, directed to decide all the issues according to law after giving adequate opportunity of hearing to the Petitioners. The Excise Commissioner passed his Order on 12th August, 1998, holding that the product "after shave lotions" were "toilet preparations" and directed the Petitioners to pay the excise duty as per the Demand Notices

dated 13th March, 1991 and 15th May, 1991 within 15 days of the said Order. This Order was challenged by the Petitioners in Writ Petition No.337 of 1998 and it was decided on 1st April, 1999. This Court held that Demand Notices dated 13th March, 1991 and 15th May, 1991 though purported to have been issued under Rule 12, were to be construed as having been issued in exercise of the powers under Rule 11 of the said Rules and consequently, the Excise Commissioner shall be entitled to recover the short paid duty on account of erroneous classification and/or calculation. It was further held that the classification as made by the Excise Commissioner as "toilet preparations" instead of "medicinal preparations" did not call for any interference. On the issue of quantification of duty as done by the Excise Commissioner this Court held that the phrase "ad valorem" appearing in the column of "rate of duty", in the schedule appended to the medicinal and toilet preparations(Excise Duty Act, 1955) referred to the value of excisable goods and, therefore, it would have to be worked out by applying the formula as laid down in Section 4(4)(d)(ii) of the Central Excise Act, 1944 and thus, the excise duty would be deducted from the wholesale price and the figure arrived at would be the value of the excisable goods. If the duty leviable is "ad valorem", 100% then it would be in the following formula:

Wholesale price at which goods are actually sold	-	100% duty ad valorem	=	Value of the excisable goods

meaning, thereby 50% of the wholesale price and 10% of the value arrived at by application of the aforesaid formula.

4. Our Judgment dated 1st April, 1999, in Writ Petition No.337 of 1998 came to be challenged in Civil Appeal Nos.414 and 415 of 2000 by both the parties. The said appeals came to be decided by the Apex Court on 29th October, 2003 by confirming the findings of this Court that the subject products were required to be classified as "toilet preparations" and the quantification formula on cum-duty basis. The findings of this Court on the first issue were set aside and it was held that the impugned Demand Notices dated 13th March, 1991 and 15th May, 1991 were under Rule 12 of the Rules.

5. In his Order dated 12th August, 1998 which was a subject matter of challenge in Writ Petition No.337 of 1998, the Excise Commissioner had held that the duty leviable after the period of Demand Notices dated 13th March, 1991 and 15th May, 1991 shall be the duty assessed and calculated at 100% ad valorem and demand on the same would be issued by the Excise Inspector attached to the factory after due approval of the Assistant Commissioner in the light of the observations made in the preceding paragraph 87. This Court while admitting Writ Petition No.337 of 1998 by Order dated 15th September, 1998, had granted interim relief in prayer (c) subject to the conditions set out therein. The relevant clause of the said Order of this Court reads as under:-

> "The Respondents are at liberty to issue notices in connection with the alleged duty liability for the period referred to in paragraph 88 (ii) of the impugned Order, and it will be open to the Petitioners to contest the validity of the same. It is undertaken by the Petitioners that as and when such Notices are issued, they will not take up the defence that they have already deposited Rs.7.5 crores in this Court, or that they have furnished the Bank Guarantee as above. The Petitioners are at liberty to challenge the Orders passed on the Notices, in this Court."

6. Accordingly, Notice dated 10th February, 1999 was issued against the Petitioner-Company to show cause why duty on the said goods should not be assessed as for the amount shown in Schedule (a), (b), (c) and (d) thereof and differences to the extent of Rs.29,21,59,143/- (Rupees Twenty Nine Crores twenty one lakhs fifty nine thousand one hundred forty three only) should not be recovered from the Petitioners. Interim reply dated 24th February, 1999 raising preliminary submissions was placed before the Excise Commissioner. After Writ Petition No.337 of 1998 was decided on 1st April, 1999, the Petitioners again submitted a representation before the Excise Commissioner to await Judgment of the Supreme Court in the recent case. In its reply dated 12th August, 1999, the Petitioners specifically pleaded before the Excise Commissioner that the assessible value for the purpose of excise duty was required to be recomputed by treating

the selling price of the after shave lotion as an “all inclusive cum duty price” while following the principle laid down by the Supreme Court in the case of **Government of India** v. **Madras Rubber Factory Ltd**.(1995(77) ELT 433). Similarly on 23rd August, 1999, submissions in writing were placed before the Excise Commissioner and ultimately by his Order dated 10th September, 1999, the Excise Inspector in charge of the Petitioner-Company decided the Show Cause Notice issued by him on 10th February, 1999 and confirmed the demand of Rs.29,21,59,143/- as per the said notice and called upon to pay the said amount on or before 27th September, 1999. The said decision of the Excise Inspector is a subject matter of challenge in this Petition.

7. Mr. Fredur de Vitre, learned Senior Counsel with Mr. M. S. Sonak, Mr. Riyaz Chagla, Mr. N. Hussain, Mr. S. M. Singbal and Mr. S. Srivastva, Advocates for the Petitioners submitted at the threshold that the Petition be decided in terms of the Judgment of the Supreme Court partly confirming the Judgment of this Court in Writ Petition No.337 of 1998 that means the Demand Notice dated 10th February, 1999 shall be treated to have been issued under Rule 12 of the Rules, the “after shave lotion” will be classified as a “toilet preparation” and the quantification of duty amount will be on the basis of cum-duty price by following the formula set out in the case of **Government of India v**. **Madras Rubber Factory Ltd.**(supra). It was further submitted that inspite of the specific issue having been raised by the Petitioner-Company in its reply dated 12th August, 1999,

regarding “all inclusive cum duty price” the Excise Inspector in the impugned Order has not given any reasons as to why the principles laid down by the Supreme Court in the case of **Government of India v. Madras Rubber Factory Ltd.**(supra) could not be followed. The Affidavit-in-reply submitted by the State Authorities after the impugned Order was passed cannot be accepted as the clarifications and the averments made in the Affidavit are nothing but filling the lacuna in the impugned Order and this is not permissible. He referred to the Constitution Bench decision in the case of **Mohinder Singh Gill and another** v. **The Chief Election Commissioner, New Delhi and others**(AIR 1978 SC 851) and more particularly the following observations:-

> “The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.”

8. As the impugned Order has not disclosed any reason in not following the law laid down by the Supreme Court in the case of **Government of India** v. **Madras Rubber Factory Ltd.**(supra) the

impugned Order is required to be set aside on that ground alone and remanded for fresh decision. It was further urged that in any case the formula for quantification adopted by this Court in Writ Petition No.337 of 1998 and confirmed by the Supreme Court in its Judgment dated 29th October, 2003 by following the cum-duty formula laid down in **Government of India** v. **Madras Rubber Factory Ltd.**(supra) is required to be adopted for the period covered by the Show Cause Notice dated 10th February,1999 and the impugned Order is manifestly erroneous in law.

9. Mr. M. S. Usgaonkar, learned Senior Counsel with Mr. Sanjay Sardessai, Advocate for the Respondent/State Authorities while supporting the impugned Order urged before us that the quantification formula followed by this Court in Writ Petition No.337 of 1998 cannot be applied in view of the Order passed by this Court on 22nd December, 1992 in Writ Petition No.84 of 1992. It was further submitted by the learned Senior Counsel that the Petitioners continue to pay excise duty per proof litre basis(the duty being Rs.10/- per proof litre) inspite of the Order passed by this Court in Writ Petition No.84 of 1992 for the period set out in para 88 of the Order passed by the Excise Commissioner on 12th August, 1998 and impugned in Writ Petition No.337 of 1998. The products have been wrongly classified as “medicinal preparations” by relying upon a decision of the Supreme Court. The Petitioners had on their own volitions stopped payment of excise duty at 100% ad valorem and thereby causing a great revenue

loss to the State. In the Affidavit-in-reply filed by the Respondents reliance has been placed to the Orders passed by this Court in Writ Petition No.109 of 1991 and Writ Petition No.84 of 1992. The Petitioners had not shown the wholesale price in the AR-2 form while despatching the products and, therefore, there was no basis to find out whether the price shown was cum-duty price. In the absence of such details, it was not possible for the State Government to accept the contentions that the quantification was required to be done on the basis of cum-duty price. Mr. Usgaonbkar, learned Senior Counsel in this regard relied upon the decision in the case of **Assistant Collector of Central Excise and others** v. **Bata India Ltd.**((1996) 4 SCC 563) and more particularly to the following observations:-

> "6. We are unable to hold this contention because the normal price charged by the manufacturer at the time and place of removal of goods to the wholesaler is treated by the Act to be the value of the goods. Sub-section 1(a) of Section 4 makes it clear that such value shall – be deemed to be the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade -. Therefore, the normal wholesale price of the goods must be deemed to be the value of the goods. It is not necessary to refer to the various types of prices that may be charged from the buyer set out in the proviso to Section 4(1)(a). But there cannot be any dispute that excise duty will be levied on the value of the excisable

goods and the basic rule is that the normal wholesale price is the value of the goods. The normal wholesale price is the cum-duty price which the wholesaler has to pay to the manufacturer. The cost of production, estimated profit and the taxes on manufacture and sale of the goods are usually included in the wholesale price of the goods. It is only because the wholesale price is usually the cum-duty price that sub-section (4)(d) lays down that "value" will not include duty of excise, sales tax and other taxes, if any, payable on the goods. But if a manufacturer includes in the wholesale price any amount by way of tax, even when no such tax is payable, then he is really including something in the price which is not payable as duty at all. He is really increasing the profit element included in the wholesale price in another guise. In such a situation, there cannot be any question of deduction of duty payable on the goods from the wholesale price because as a matter of fact, no duty has actually been included in the wholesale price."

"10. For the purpose of excise duty, the manufacturer has to submit a price list to the excise authority before removal of the goods from the factory. He has to indicate in the forms and documents relating to assessment, the value of the goods and the amount of duty which will form part of the prices at which such goods are to be sold. Costs and estimated profits are included in the price of the goods. Inclusion of the anticipated amount of the excise duty in the wholesale price is the last part of the pricing

> mechanism. The manufacturer has to calculate the value on which duty would be payable, estimate the amount of duty payable and add that amount to the value of the goods to arrive at the wholesale price. It is on the value of the goods and not the cum-duty price that the duty is paid to the excise authority before the clearance of the goods."

10. It was further contended by the Respondents, by referring to the Affidavits filed in the earlier rounds, that in any event, the Petitioners have recovered much more than the amount of duty payable at 100% ad valorem. For a pack at price of Rs.23.00, the excise duty of Rs.23.30 is added and the sale tax is paid at 23.30 + 23.00 i.e. at a total Rs.46.30. Thus, the company has already collected Rs.23.30 from the customers but paid to the State Government only payment on the basis of proof litre, takling shelter of interim Order dated 22-8-1991 passed in Writ Petition No.109 of 1991. Similarly, for a bottle of 120 ml. the price which was Rs.10.95 in January, February/March, 1996, was shown at 22.48 i.e. almost double which indicated that the Petitioners had doubled the price and recovered the duties corresponding to such price and paid sale tax thereon. It is further alleged that after Writ Petition No.109 of 1991 was decided by this Court the Petitioners have collected from the customers duty at 100% on almost double the price for the period from August, 1991 onwards and they have practically recovered even

the amount due for the past dues. The onus of proving that for the relevant period the products lifted/despatched were in fact cum-duty price squarely fell on the Petitioners by filling in the AR-2 Form which they did not do and instead the despatches were cleared on the basis of invoices and by remitting the duty per proof litre which amount was insignificant as compared to the ad valorem at 100% of the wholesale price. It was further urged by Mr. Usgaonkar, that the formula for quantification of the balance of the duty as adopted by this Court in Writ Petition No.337 of 1998 and confirmed by the Supreme Court cannot be accepted on the facts and in the circumstances of the present case and more so when the Petitioners were themselves aware that they were liable to pay the duty on the basis of “toilet preparations” and they continued to pay the duty on proof per litre basis. By referring to the Show Cause Notice dated 10th February, 1999 and the impugned Order, it was pointed out that the Petitioners failed to place before the competent authority the record in support of the wholesale price and, therefore, the quantification formula as urged by the Petitioners cannot be accepted in the instant case for the subsequent period covered by Show Cause Notice dated 10th February, 1999.

11. The only issue at variance between the parties is regarding the quantification of the excise duty payable. The Petitioners claim that the quantification is required to be done by following the formula adopted by this Court in Writ Petition No.337 of

1998 and duly confirmed by the Supreme Court i.e. cum-duty price based calculation. The Respondents on the other hand do not dispute the applicability of the said formula but state that the despatches made for the relevant period did not indicate the wholesale price and the excise duty was paid on proof per litre basis and not on 100% ad valorem on the wholesale price. They point out to the letter dated 3-10-1989 addressed by the Petitioners to the Excise Commissioner in which the Petitioners had submitted the price list on behalf of PJM Pharmaceuticals Pvt.Ltd. showing the duty per proof litre basis.

Product	Price inclusive of duty	Duty of Rs. 10/- per proof litre	Print Price
1	2	3	4
1. Blue Stratos After Shave Lotion 50 ml.	21.87	0.52	28.50
2. Blue Stratos After Shave Atomiser 50 ml.	28.76	0.52	37.50
3. Blue Stratos After Shave Atomiser 100 ml.	36.78	1.04	48.00

12. There is no dispute that the Petitioners have paid excise duty at the rate of Rs.6.60 per proof litre from 1985 to 1989 and at the rate of Rs.10/- per proof litre from 1989 onwards. The relevant period covered by the impugned Order is divided into three parts as under:-

a). From 9-9-91 to 7-5-95

b). From 7-5-95 to 1- 6-98

c). From 3-6-98 to 17-8-98

Pursuant to the Demand Notice dated 10-2-1999 and for the first period the recovery has been ordered at Rs.15,60,92,547/-, for the second period Rs.9,95,47,542/- and for the third period Rs.30,73,427/-.

With the impugned Order, for the three different periods, three annexures have been annexed with the total recovery amount of the respective periods as mentioned hereinabove. There does not appear to be much of a dispute in the quantification made for the first period(Ann.1) annexed to the impugned Order i.e. from 9-9-1991 to 6-5-1995 but for the remaining two periods the Petitioners dispute the quantification made and contend that it is in breach of the view taken by this Court in Writ Petition No.337 of 1998. The impugned Order has given the following explanation for the respective periods:-

a). It was observed that the Company had levied ad valorem duty at the rate of 100% equivalent to Net Trade prices shown in the invoices raised by the company during the period from 9-9-91 to 6-5-95 and had calculated excise duty at 100% and paid Sales Tax on totality of the same. But the said Company had paid the actual duty at the rate of Rs.10/- per proof litre. Accordingly, the amount shown in column no.6 at serial no. 1 of the Schedule is recoverable from the said Company.

b). On perusing the invoices for the period from 7-5-95 to 1-6-98, it is observed that the said Company had levied excise duty at the rate of Rs.10/- per proof litre as shown in the invoices and sold by them during that period and equal amount in duty has been paid into Government Treasury.

c). For the period from 2-6-98 to 7-8-98, calculation has been done in the same manner as shown in the earlier two periods with a difference that instead of 100% ad valorem duty, 50% has been levied in terms of Notification No.1/98/M & T.P dated 2-6-98 of the Government of India under the Medicinal and Toilet Preparations(Excise Duties) Act, 1955.

13. The Respondents contend that the Judgment of this Court in Writ Petition No.337 of 1998 cannot be read in isolation and, therefore, it cannot be held that in every case the formula devised in

the case of **Government of India** v. **Madras Rubber Factory Ltd. (**supra) is required to tbe followed. Unless there is proof to show that the price charged was a cum-duty price, the said formula cannot be followed. The Petitioners were required to fill in AR-2 form before despatching the subject items out of factory premises and instead they effected the despatches on the basis of the invoices notwithstanding the Orders passed by this Court in Writ Petition Nos.109 of 1991 and 84 of 1992.

14. While disposing off Writ Petition No.109 of 1991 by Judgment dated 22-8-1991, this Court in para 12(d) noted thus:-

> "Till the final decision is rendered, the respondents will defer recovery pursuant to Exhibit M. Similarly, the demand contained in Exhibit N to the extent it relates to the demand for duty in excess of what had been levied immediately prior to the issue of the notice would also be deferred till the final decision in the manner indicated above is taken by the second respondent. It need hardly be clarified that if ultimately the added liability is cast on the petitioner as a result of the adjudication of the issue, the peitioner will be liable to pay the entirety of such liability, notwithstanding the intervening interim facility accorded by this judgment" (Emphasis supplied).

Similarly, in Writ Petition No. 84 of 1992, the Division Bench of this Court in its Judgment dated 21st/22nd December, 1994, in para 24 observed as under:-

> "..... Before we conclude, we may also mention that the respondents have filed an interim application making a grievance that the petitioners are recovering the excise duty at the rate of 100% ad valorem although they are actually paying the duty at the rate of Rs.10/- per proof litre on the basis that their product is medicinal preparation and on that basis a direction is sought against the petitioners to deposit the amount in this Court. Mr. Hidayatullah has strongly refuted the allegations made by the respondents. According to Mr. Hidayatullah this is only a notional break-up shown in the sale invoices and the petitioners are not recovering the excise duty at 100% ad valorem as alleged by the respondents. We do not wish to express any opinion on this controversy, since it is for the Excise Commissioner to decide the question. <u>But we make it clear that the break-up shown by the petitioners is only a notional break-up as per their own contention and, therefore, in case the Excise Commissioner comes to the conclusion that the classification submitted by the petitioners is wrong and the petitioners product is liable to be taxed as a toilet preparation, the Excise Commissioner shall ignore this notional break-up and shall</u>

> levy the duty in accordance with the provisions of the Act: (Emphasis supplied).

15. By letter No.Exc/PON/90-91/686, dated 13-3-1991, the Excise Inspector had informed the Petitioners as under:

> "I am directed by the Commissisoner of Excise, Panaji, to charge immediately the Excise Duty at the rate of 100% Ad valorem as prescribed by Medicinal and Toilet Preparation Excise Duty Act, 1955 and Rules made thereunder. Hence, you are hereby requested to pay the Excise Duty at the rate of 100% on the following products:
>
> 1. All products of Old Spice After Shave Lotion.
>
> 2. Blue Stratos After Shave Lotion."

This direction was challenged in Writ Petition No.109 of 1991 and the above quoted Orders passed in the said Petition as well as in Writ Petition No.84 of 1992 had clearly stipulated that if ultimately, it was held that the classification of the subject products was required to be done under toilet preparations, the excise duty at 100% ad valorem will have to be paid by the Petitioner No.1-Company. Even in Writ Petition No.337 of 1998, this Court had observed in para 44 as under:-

> "Section 4(1)(a) provides that when duty of excise is chargeable on any excisable goods with reference to value, the normal price at which such goods are sold shall be deemed to be the value of such goods, subject to other provisions of Section 4. Clause (d) of sub-section (4) of Section 4 provides that the value will include the cost of packing of goods except for the cost of packing which is of a durable nature and is returnable by the buyer to the assessee. Sub-clause (ii) of Clause (d) categorically lays down that the value in relation to any excisable goods will not include the amount of duty of excise, sales tax and other taxes, if any, payable on such goods. If it was not so, it will amount to levying duty on the excise duty, which may be already included in the price of the goods. Ofcourse, if the wholesale price does not include excise duty payable on goods, then there will be no question of deduction of any duty for determination of value in relation to any excisable goods. Therefore, when the duty is imposed ad valorem, calculation of duty shall have to be made on the basis of the value of any excisable goods"(Emphasis supplied).

16. The Petitioners were fully aware that as per the Orders passed by this Court in Writ Petition Nos.109 of 1991 and 84 of 1992 the liability of payment of excise duty at 100% ad valorem could be cast if it was ultimately held that the classification of the subject

products was made as toilet preparations. However, the Company did not despatch the products in compliance with the Rules and by filling in Form AR-2. Rule 9, 40 and 81 of the Rules read as under:-

> "**9. Time and manner of payment of duty. -** (1) No dutiable goods shall be removed from any place where they are manufactured or any premises appurtenant thereto, which may be specified by the Excise Commissioner in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these rules or as the Excise Commissioner may require."
>
> "**40. Issue from a bonded manufactory.-** (1) Issues of alcoholic preparations and preparations containing opium, Indian hemp or other narcotic drugs and narcotics shall be made from a bonded manufactory on payment of duty. The licensee shall present before the officer-in-charge an application in Form AR-2 signed by him or by his authorized representative. The officer-in-charge shall, after checking the entries and realizing the duty payable, allow the required quantities to be removed after issuing a permit".
>
> "**81. Clearance on payment of duty. -** When the licensee desires to remove goods on payment of duty, he shall make an application in Form AR-2 in triplicate, to the

> officer-in-charge or the proper officer, as the case may be, at least twelve hours before he is intended to remove the goods. The officer shall, thereupon, assess the amount of duty leviable on the goods and on production of evidence that the sum has been paid into a treasury or the sum has been debited to the account-current, as the case may be, shall allow the goods to be cleared".

17. Form AR-2 has been appended to the Rules aand contains the columns inter alia of "Value" and "Duty". Under the column "Duty" there are two sub-columns, namely, "Rate" and "Amount". From the value shown in the AR-2 Form , if duty is reduced, the wholesale price is arrived at and on this wholesale price 100% ad valorem will be the duty payable. In the Affidavit-in-reply filed on behalf of the Respondents it has been stated in para 20 as under:-

> "In order to calculate the duties, it was necessary to get particulars from the assessee/Petitioner. The Department requested the assessee by letter dated 15-9-1999 to furnish copies of invoices from 16-8-1991 to 17-8-1998 in respect of two products sold by them. The assessee by their letter dated 30-9-1998 suggested that Department verifies the invoices at the factory premises itself. Accordingly, the officer of the Department undertook the process of verification of the invoices at the factory premises of the assessee."

It is also obvious from the record that the Petitioners went on paying the duty at Rs.10/- per proof litre and they have not indicated exactly the wholesale price and merely by paying the excise duty on proof per litre basis it cannot be accepted that it was a cum-duty price as shown in the invoices. It is thus clear that the onus of proving the issue of cum-duty price squarely falls on the Petitioners and the learned Senior Counsel appearing for the Respondents fairly conceded that if this issue was proved, the formula as set out in the decision of this Court in Writ Petition No.337 of 1998 would be applicable. The Petitioners will have to submit the invoices/AR-2 forms or any other documentary proof to arrive at the conclusion that the price shown by them was a cum-duty price and unless it is established that the price was a cum-duty price, the quantification in the manner advanced by the Petitioners cannot be undertaken.

18. However, it is pertinent to note that the impugned Order is eloquently silent on the issue of cum-duty price and the applicability of the formula set out in our Judgment in Writ Petition No. 337 of 1998. No reasons have been given as to why the same formula could not be adopted though it has been stated that as per the Orders passed by this Court in Writ Petition Nos. 109 of 1991 and 84 of 1992, the Petitioners were aware of their ultimate liability in the products to be classified as toilet preparations. This reasoning does not suffice the legal requirements moreso when this Court has made applicable the

cum-duty formula devised in the case of **Government of India** v. **Madras Rubber Factory Ltd.**(supra) for the earlier period whilst deciding Writ Petition No.337 of 1998.

The learned Senior Counsel appearing for the Petitioners was right in his contentions that the subsequent Affidavits filed cannot fill in this lacuna and the impugned Order, therefore, is unsustainable on this ground. The dispute of quantification of the excise duty after the decision of the Supreme Court partly confirming our Judgment in Writ Petition No.337 of 1998 is required to be adjudicated afresh for the relevant periods and it shall be the responsibility of the Petitioners to place before the appropriate authority all the relevant records so as to ascertain the issue of cum-duty price to adopt the formula set out in our Judgment in Writ Petition No.337 of 1998 for quantification of the excise duty for the subsequent periods covered by the impugned Order. We are not impressed with the contentions of the Petitioners that the quantification in this case is also required to be undertaken by following the same formula suo motu. The Petitioners will have to appear before the appropriate authority and on the basis of the record that may be available with them the issue of cum-duty price will have to be settled. No other issues raised in this Petition remain to be decided in view of our earlier decision in Writ Petition No.337of 1998.

19. In the result, we allow this Petition partly and quash and set aside the impugned Order only on the point of quantification. The Excise Inspector is directed to re-work the quantification of excise duty on the basis of the documents the Petitioners will submit before him so as to ascertain whether the despatches were done by showing cum-duty price or to work out the wholesale price with cum-duty so as to adopt the formula devised in the case of **Government of India** v. **Madras Rubber Factory Ltd.**(supra) for determining the final liability of the Petitioner-Company in respect of the period covered by Notice dated 10-2-1999. The issue of quantification will be adjudicated as expeditiously as possible and in any case within a period of three months from the date of first appearance by the Petitioners before him. The Petitioners to appear before the Excise Inspector on 16th November, 2004 at 11.00 a.m. Costs in cause.

B. H. MARLAPALLE, J.

N. A. BRITTO, J.

RD.